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No. 198

In the Supreme Court of the United States

OCTOBER TERM, 1960

MAURO JOHN MONTANA, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the court of appeals (R. 50–56) is reported at 278 F. 2d 68.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1960 (R. 56). A petition for rehearing was denied on May 26, 1960 (R. 57). The petition for a writ of certiorari was filed on June 29, 1960, and was granted on October 17, 1960, 364 U.S. 861 (R. 57). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the petitioner, who was born in Italy in 1906 of a citizen mother and an alien father, was a citizen of the United States at birth, or became a citizen on his mother's return to the United States in 1906.

STATUTES INVOLVED

R.S. 2172 (1878 ed.), which is substantially the Act of April 14, 1802, 2 Stat. 153, Section 4, provided in pertinent part:

> The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; * * *.

R.S. 1993 (1878 ed.), which is substantially the Act of February 10, 1855, 10 Stat. 604, Section 1, provided:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to

children whose fathers never resided in the United States.

Sections 3 and 5 of the Act of March 2, 1907, 34 Stat. 1228–1229, provided:

> SEC. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.
>
> SEC. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided,* That such naturalization or resumption takes place during the minority of such child: *And provided further,* That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

The Act of May 24, 1934, 48 Stat. 797, provided:

> That Section 1993 of the Revised Statutes is amended to read as follows:
>
> "SEC. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United

States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."

SEC. 2. Section 5 of the Act entitled "An Act in reference to the expatriation of citizens and their protection abroad", approved March 2, 1907, as amended, is amended to read as follows:

"SEC. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the father or the mother: *Provided,* That such naturalization or resumption shall take place during the minority of such child: *And provided further,* That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States."

* * * * *

STATEMENT

Petitioner was ordered deported by the Immigration and Naturalization Service after a hearing. He then brought this action for a declaratory judgment of United States citizenship in the District Court for the Northern District of Illinois, pursuant to Section 360 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1503 (R. 6–12, 41–44). At the conclusion of the case, the district court found that petitioner had not acquired United States citizenship at birth by virtue of the Constitution or any statutory enactment. (R. 35, 38–40). On appeal, the court of appeals affirmed the judgment of the district court (R. 50–56).

The pertinent facts may be summarized as follows:

Petitioner's mother was a native-born United States citizen, having been born in the United States in 1890, and his father an Italian national. The parents were married in the United States on August 26, 1905 (R. 20–21). The father was never naturalized in this country and has remained an alien up to the present time (see R. 50). On February 2, 1906, petitioner's parents traveled to Italy for a visit (R. 22; see R. 23). At that time, petitioner's mother was a few months pregnant (with the petitioner). On June 26, 1906, petitioner was born in Acerra, Italy (R. 24, 39).

At the trial, petitioner's mother testified that, before the petitioner was born, she tried to get a United

States passport to return to the United States, but that the American consul at Naples did not think that she should return to this country while she was pregnant (R. 22–24). She obtained the passport with no difficulty after the petitioner was born (R. 25). She also testified that she and her husband quarreled in Italy, that he returned to the United States about two and a half months before petitioner was born, that she returned to the United States with the petitioner on September 19, 1906, and that she and her husband were separated an additional three months in this country (R. 24–27, 33). She and her husband have lived together from that time up to the time of trial, and five additional children were born to them in the United States (R. 26, 28–29, 34).

SUMMARY OF ARGUMENT

Petitioner was not granted citizenship by any of the three statutes he invokes.

I

At the time of petitioner's birth in Italy in 1906, two statutes—R.S. 1993 and R.S. 2172—dealt with the acquisition of United States citizenship by foreign-born children of Americans. R.S. 1993, which was an 1874 re-enactment of the Act of February 10, 1855, 10 Stat. 604, conferred citizenship upon those foreign-born children "whose fathers were or may be at the time of their birth citizens thereof." By its terms, R.S. 1993 applied to children "heretofore born or hereafter born" outside the United States. Admittedly, it does not apply to petitioner because his father was not a citizen.

R.S. 2172, a re-enactment in 1874 of Section 4 of the Act of April 14, 1802, provided that "children of persons *who now are, or have been,* citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof * * *" (emphasis added). That clause required both parents to have been citizens of the United States, and in addition was always construed as not being prospective in application. In fact, the reason for the enactment of the 1855 Act (R.S. 1993), *supra,* pp. 2–3, was that the second clause of the 1802 Act was not prospective. Throughout the histories of the naturalization and citizenship legislation which followed the 1874 re-enactments of the 1802 and 1855 legislation, Congress took it for granted that the second clause of R.S. 2172 was not prospective, pointing out that the citizenship status of foreign-born children was determined by the citizenship of their fathers, and that R.S. 1993 was the exclusive statute which currently applied to the situation of such foreign-born children. H. Rep. No. 1110, 67th Cong., 2d Sess.; H. Rep. No. 131, 73d Cong., 1st Sess., and S. Rep. No. 865, 73d Cong., 2d Sess.

Moreover, if petitioner's construction of R.S. 2172 were adopted, there would be a direct conflict between R.S. 2172 and R.S. 1993, since the foreign-born children of "persons" (including *mothers*) who now are citizens would be citizens under R.S. 2172, while R.S. 1993 confers citizenship upon those foreign-born children whose *fathers* were citizens at the time of their birth. Petitioner's proposed construction that "persons" in R.S. 2172 could mean "mother" alone would

conflict with R.S. 1993 making the "father" the focal point of citizenship. Moreover, it would mean that citizenship could be transmitted by a mother who had never resided in the United States, contrary to the explicit requirement of prior residence which appears in every other enactment on the subject. The duty of the courts is to "reject any construction which would make one section inconsistent with another relating to the same general subject." *United States* v. *Kellar*, 13 Fed. 82, 83–84 (S.D. Ill.).

II

Section 3 of the Expatriation Act of 1907, 34 Stat. 1228–1229, provided for the expatriation of any American woman who married an alien, but also provided that, on the termination of the marital relation, the woman could resume her American citizenship on fulfilling certain requirements. Section 5 of that Act conferred citizenship upon the foreign-born children whose "parent" "resumed" American citizenship or became naturalized during the minority of the child. Although the 1907 Act was not specifically retrospective in application (41 Cong. Rec. 1466), petitioner contends that he became a citizen under Section 5 of the 1907 Act because his mother, in 1906, "resumed" her "residence" in the United States.

Although there is a split of authority as to whether an American woman lost her citizenship on her marriage, without more, to a foreigner prior to 1907 (compare *In re Page*, 12 F. 2d 135 (S.D. Cal.), with *In re Fitzroy*, 4 F. 2d 541 (D. Mass.)), the weight of authority was that marriage caused a forfeiture of

American citizenship only when accompanied by a change of domicile abroad. Both sides agree that since petitioner's parents were married in 1905—before the enactment of the Expatriation Act of 1907—and since there was no change of domicile abroad (the 1906 trip to Italy being only for a visit), petitioner's mother did not lose her United States citizenship on her marriage. Petitioner, therefore, could not acquire citizenship benefits on his mother's resumption of residence in 1906 since, not having lost her citizenship, there was no possibility of a *resumption* of citizenship on her return to the United States. *Petition of Black,* 64 F. Supp. 518 (D. Minn.).

Moreover, if petitioner's mother had lost her citizenship in 1906, she could not have resumed it on returning to the United States in that year because there was no termination of the marital relation with the alien husband, petitioner's father. The plain words of the 1907 Act, as well as its legislative history, show that Congress intended to allow the woman (whose marriage caused the loss of United States citizenship) to resume her United States citizenship when the impediment was removed by termination of the marriage. The mere fact that petitioner's mother and father are alleged to have lived apart for about six months after the petitioner was born, and that petitioner returned to the United States with his mother alone in 1906, did not bring about a "termination" of the marital relationship within the contemplation of the statute. The mother testified that they became reconciled later in 1906, and have lived together in the marital relationship down to the

present time. There was thus no termination of the marital relationship by death of the husband, or divorce, or, at the very least, by mutual separation with absolute custody of the child in the wife (see *United States ex rel. Guest* v. *Perkins*, 17 F. Supp. 177 (D.D.C.)), within the contemplation of the 1907 Act.

Finally, it should be noted that the statute does not confer citizenship upon the foreign-born child whose "parent" merely resumes a "residence" in the United States. Section 5 confers citizenship upon such children, following upon a resumption of lost citizenship—not merely of residence—on the part of the parent. Even if petitioner's mother changed her residence in 1906, he could claim nothing under the Act.

III

Section 2 of the Act of May 24, 1934, 48 Stat. 797, amended Section 5 of the Expatriation Act of 1907, to provide for the citizenship of foreign-born children whose "father or * * * mother" resumed United States citizenship or became naturalized during the minority of the children. Petitioner contends that, "by virtue of his mother's nationality and resumption of residence," he became a citizen of the United States under Section 2 of the 1934 Act.

The same reasons which operate to deny petitioner relief under Section 5 of the 1907 Act likewise deny him relief under Section 2 of the 1934 Act, for Section 2 was adopted only for purposes of "clarif[ying] the present uncertainties of the law [Section 5 of

the 1907 Act]." S. Rep. No. 865, 73d Cong., 2d Sess., at p. 1; H. Rep. No. 131, 73d Cong., 1st Sess., at p. 2. Petitioner cannot derive citizenship under the 1934 Act, as under Section 5 of the 1907 Act, because (1) his mother never lost her citizenship and, hence, did not "resume" citizenship under Section 3 of the 1907 Act or Section 2 of the 1934 Act; (2) if his mother had lost her citizenship on her marriage to an alien in 1905, there could be no resumption of her United States citizenship until there had been a "termination" of the marital relation, a fact not present in this case; (3) the 1907 and 1934 Acts do not confer citizenship upon a minor child whose mother merely "resumes" her "residence" in the United States, nor does it allow a woman to resume her citizenship simply upon such a resumption of residence; citizenship could come through the mother only if, having lost her citizenship through marriage to a foreigner, she "resumed" such citizenship on a termination of the marital relationship.

IV

In the district court, petitioner's mother testified that, after spending about a month and a half in Italy in early 1906, she desired to return to the United States. She went to a "little town", accompanied by her parents, to obtain passports, but the official on duty referred her (but not her parents) to the United States consul at Naples. When she subsequently applied for a passport there, the consul "just took one look at me and he says, 'I am sorry, Mrs., you cannot in that condition * * *.' 'You come back after you

get your baby'" (R. 23). Petitioner contends that he should be deemed a citizen because the alleged misconduct of the consul prevented him from being born in the United States. There is no merit to this claim.

In the first place, the trial judge, as fact finder, does not appear to have credited the claim that Mrs. Montana was denied a passport. He understood that petitioner was claiming estoppel, at least in part, but nevertheless dismissed the action at the conclusion of the case, finding that petitioner had not sustained his burden of proof (R. 35, 39–40, 47). The fact finding body, particularly in citizenship and allied cases, "need not accept uncontradicted testimony when good reasons appear for rejecting it, such as the interest of the witness, and improbabilities and important discrepancies in the testimony." *Yip Mie Jork* v. *Dulles,* 237 F. 2d 383 (C.A. 9); *Flynn ex rel. Yee Suey* v. *Ward,* 104 F. 2d 900 (C.A. 1). Petitioner's mother had an interest, and a major one, in the outcome of petitioner's suit for declaratory relief.

Moreover, the testimony of petitioner's mother does not indicate that she was actually *denied* a passport but rather, at most, that the consul suggested to her that she wait until her child was born before traveling back to the United States. Her testimony is quite consistent with the consul's having suggested to her that she wait for her child to be born; the words, "you cannot in that condition", could quite easily mean no more than, "you're not well enough to travel from here to the United States in that condition and should wait until after the birth".

It seems incredible that the consul would have denied a passport to Mrs. Montana since, in 1906, there was no requirement for a citizen, on entering or returning to the United States, to obtain a passport. See *Kent* v. *Dulles*, 357 U.S. 116. There would thus be no occasion for petitioner's mother to apply for a passport, save possibly the one now advanced by petitioner that Italian law might have affected "those persons who wished to leave Italy" (Pet. Br. 30). But the record and briefs are barren of any requirement of Italian law that a passport was necessary or that petitioner's mother thought that she had to have a passport for her return to the United States. In any event, there is no reason to believe that, if Italy required a passport, the consul would have denied one, especially since it was unnecessary under American law.[1]

Finally, even if the claim of passport denial were accepted, the conduct on the part of the American consul would be insufficient, as a matter of law, to

[1] The unlikelihood of a denial of a passport by the consul is further emphasized by Mrs. Montana's testimony that her father was a citizen of the United States, and that her parents—both father and mother—obtained their respective passports in the "little town", but that, since the people there could not find her name, "they said * * * [that she] had to go to the American Consul" to get her "passport" (R. 22, 24). The father could not have obtained his American passport in the "little town", since, at that time, only "diplomatic or consular officers of the United States * * * and no other person" could issue or verify passports in foreign countries. R.S. 4075. The office in the "little town" was not a diplomatic or consular office because the people there sent petitioner's mother to the "American Consul" for her passport (R. 22). And, if it were, the sending of petitioner's mother to the "American Consul" for her passport would have been unnecessary.

estop the government from contesting petitioner's claim to citizenship. There is no showing that Mrs. Montana (who presumably did not have a passport when she left the United States since that passport would have been valid for a year and there would have been no need for her to secure one in Italy), thought that she had to have a passport in order to return to the United States, and in fact she did not need one. And if the consul had granted the passport, there would have been no assurance that petitioner would have been born in the United States. The controlling authorities preclude the government from relying upon improper conduct of government officials only when such conduct directly causes loss of citizenship rights. They are inapposite here, for the alleged misconduct in this case—even if it be conceded to exist—did not directly lead to petitioner's birth in Italy.

ARGUMENT

Since petitioner was born in Italy, he has no claim to American citizenship under the first section of the Fourteenth Amendment. *United States* v. *Wong Kim Ark*, 169 U.S. 649. He must rest his claim solely on some Congressional enactment granting citizenship to individuals in his class, "for, wanting native birth, [he] can not otherwise become a citizen of the United States." *Zartarian* v. *Billings*, 204 U.S. 170, 173; see also *United States* v. *Wong Kim Ark, supra*, at 668, 702. We show that he has no claim under the controlling legislation at the time of his birth, R.S. 1993; that none of the three statutes which he invokes is applica-

ble to his case; and therefore that he has never been and is not now a citizen of the United States. Petitioner appeals (Br. 20) to considerations of equity, but such considerations do not authorize a gift of citizenship which Congress did not confer.

I. PETITIONER DID NOT ACQUIRE UNITED STATES CITIZENSHIP UNDER THE SECOND CLAUSE OF SECTION 2172 OF THE REVISED STATUTES

Petitioner's principal claim is rested on the second clause of R.S. 2172, *supra*, p. 2, which provides that "the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof." This provision, however, is of no aid to petitioner, because it requires both parents to have been Americans, because it was not intended to operate prospectively, and because in any event it was not intended to affect individuals whose parents had not been citizens by the time of its enactment.

A. THE BACKGROUND AND CONTEXT OF R.S. 2172 AND R.S. 1993.

At common law, citizenship status was grounded upon the principle of *jus soli*, which declared that all persons (with certain exceptions not material here) born within the allegiance and jurisdiction of the King were natural-born subjects. The acquisition of citizenship through descent—the principle of *jus sanguinis*—is foreign to the principles of the common law and is based wholly upon statutory enactments. *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702; see *Zartarian* v. *Billings*, 204 U.S. 170, 173. In Eng-

land, the statute of 25 Edward III, Stat. II (1350) conferred the rights of nationality upon foreign-born children of natural-born subjects; and by the statute of 13 George III, c. 21 (1773) those rights were extended to foreign-born grandchildren of natural-born subjects.

Congress, by successive statutes, has made provision for the admission to citizenship of certain foreign-born children, among them (1) foreign-born children of American citizens and (2) minor children dwelling within the United States whose parents became naturalized citizens. Although Congress was primarily concerned with the citizenship status of foreign-born children of "American parents" (1 Annals of Congress, 1st Cong., 1st Sess., p. 1121), the Act of March 26, 1790, 1 Stat. 103–104, provided for the citizenship of minor children whose parents became naturalized citizens, as well as for the citizenship of foreign-born children of citizen parents. This statute provided in pertinent part (1 Stat. 104):

> And the children of such persons so naturalized, dwelling within the United States, being under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States. And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided,* That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States. * * *

Although the Act of January 29, 1795, 1 Stat. 414–415, expressly repealed the 1790 Act, the above provisions of the 1790 Act were re-enacted almost verbatim in Section 3 of the 1795 Act. Compare 1 Stat. 104 with 1 Stat. 415; *Weedin* v. *Chin Bow*, 274 U.S. 657, 661–662. The Act of June 18, 1798, 1 Stat. 566–569, amended the 1795 Act with respect to the registration and naturalization of aliens in this country. Shortly thereafter, Congress enacted the controversial "Act concerning Aliens"; which sanctioned the removal of certain aliens in the country and subjected them to penalties and restrictions. Act of June 25, 1798, 1 Stat. 570–572; H. Rep. No. 108, 5th Cong., 2d Sess., May 1, 1798, reported in 37 *Am. State Papers*, Misc. 1, 1789–1809, Class X, p. 180.[2] This latter Act, however, was not enforced, and was not renewed by Congress when its two-year life expired under Section 6. See 1 Stat. 572; Gordon and Rosenfield, *Immigration Law and Procedure* (1959 ed.), pp. 5, 394.

The Act of April 14, 1802, 2 Stat. 153–155, revised the naturalization and citizenship laws of the United States and, in Section 5, repealed "all acts heretofore passed respecting naturalization." The 1802 Act, therefore, repealed the 1795 Act (which had itself re-

[2] For the history of this statute in Congress, see *Abridgement of the Debates of Congress*, 1796–1803 (1857 ed.), Vol. II, pp. 276–280; H. Rep. No. 108, 5th Cong., 2d Sess., May 1, 1798, reported in 37 *Am. State Papers*, Misc. 1, 1789–1809, Class X, p. 180. See also H. Rep. No. 125, 6th Cong., 1st Sess., March 14, 1800 reported in 37 *Am. State Papers*, Misc. 1, 1789–1809, Class X, p. 208.

pealed the 1790 Act) and the Naturalization Act of June 18, 1798 (which amended the 1795 Act). The 1802 Act did not repeal "the hated Alien and Sedition laws, the so-called Nationality Act of 1798", as petitioner contends (Pet. Br. 11). As just indicated, the controversial "Act concerning Aliens", enacted on June 25, 1798, *expired* according to its own terms long before the 1802 Act was passed.

Section 4 of the 1802 Act provided (in relevant part) (2 Stat. 155):

> That the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: *Provided,* that the right of citizenship shall not descend to persons whose fathers have never resided within the United States. * * *

The first clause of this Section 4 was a substantial reenactment of the provisions of Section 3 of the 1795 Act, which conferred citizenship upon minor children (dwelling in the United States) whose parents were naturalized. Compare 1 Stat. 415 with 2 Stat. 155.

See H. Doc. No. 326, 59th Cong., 2d Sess., at p. 77. The second clause of Section 4—"and the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States," coupled with the proviso—was a substantial re-enactment of the remainder of Section 3 of the 1795 Act, which conferred citizenship on the foreign-born children of "citizens of the United States." Compare 1 Stat. 415 with 2 Stat. 155. Actually, the second clause of the 1802 Act went further than Section 3 of the 1795 Act, for it conferred citizenship upon the children "of persons who now are, or *have been citizens* of the United States" (emphasis added), while Section 3 of the 1795 Act required that the parents *be citizens* at the time of the birth of the child.

In 1854, Mr. Horace Binney wrote a lengthy article entitled, *The Alienigenae of the United States,* published in 2 American Law Register 193, in which he pointed out that the second clause of the 1802 Act was not prospective in application and that, therefore, foreign-born children of American parents who were not citizens on or before April 14, 1802, were aliens. In 1855, apparently in response to Mr. Binney's article,[3] Congress enacted a statute, which was

[3] Two expressions by this Court support the assumption that the 1855 legislation was enacted to correct the defect in the 1802 law found by Mr. Binney. *United States* v. *Wong Kim Ark*, 169 U.S. 649, 674; *Weedin* v. *Chin Bow*, 274 U.S. 657, 663, 664. See also *Ying* v. *Cahill*, 81 F. 2d 940 (C.A. 9); *Guest* v. *Perkins*, 17 F. Supp. 177, 179 (D.D.C).

both prospective and retrospective in application, and which conferred the rights of citizenship upon those foreign-born children whose *fathers* were United States citizens at the time of their birth. The Act of February 10, 1855, 10 Stat. 604, provided:

> That persons *heretofore born, or hereafter to be born,* out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States; shall be deemed and considered and are hereby declared to be citizens of the United States: *Provided, however,* That the rights of citizenship shall not descend to persons whose fathers never resided in the United States. [Emphasis added.]

In the debates which preceded the 1855 Act, Congressman Cutting of New York, who sponsored the bill, pointed out that the second clause of the 1802 Act was "not prospective in its terms", and that it applied only to children born abroad up to and including April 14, 1802, and not afterwards, "so that the children of a man who happened to be in the world on the 14th of April, 1802, born abroad, are American citizens, while the children of persons born on the 15th of April, 1802, are aliens to the country." 32 Cong. Globe 170, 33d Cong., 1st Sess., January 13, 1854. Other Congressmen expressed the view that the legislation was "pre-eminently worthy of adoption" and that the bill "remedies a very glaring defect in the existing law." *Id.* at 171.

In revising and codifying the federal statutes, Congress, in 1874, re-enacted the 1802 Act and the

1855 Act into the Revised Statutes of the United States. R.S. 2172 is a substantial re-enactment of the 1802 Act, except that the proviso "that the right of citizenship shall not descend to persons whose fathers have never resided within the United States" (in the 1802 Act) was omitted. R.S. 2172 reads:

> The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; * * *.

R.S. 1993, a substantial re-enactment of the 1855 Act, provided:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.*

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*Under R.S. 1993, the father must have resided in the United States at some period prior to the birth of the foreign-born child. *Weedin* v. *Chin Bow*, 274 U.S. 657, 667–668, 675;

B. THE SECOND CLAUSE OF R.S. 2172 REQUIRED BOTH PARENTS TO BE CITIZENS, AND IN ANY CASE WAS NEVER INTENDED TO BE CONSTRUED AS PROSPECTIVE

Petitioner does not claim that he was born a citizen under the provisions of R.S. 1993, *supra*, pp. 2–3. He cannot make such a claim, for his father was not a citizen at the time of his birth in 1906 (and is not now a citizen). R.S. 1993; *United States ex rel. Abdoo* v. *Williams*, 132 Fed. 894, 895 (S.D.N.Y.). See *Weedin* v. *Chin Bow*, 274 U.S. 657, 666; *Wolf* v. *Brownell*, 253 F. 2d 141, 142 (C.A. 9), certiorari denied, 357 U.S. 942; *MacKay* v. *McAlexander*, 268 F. 2d 35, 38–39 (C.A. 9), certiorari denied, 362 U.S. 961; *United States ex rel. Guest* v. *Perkins*, 17 F. Supp. 177, 179 (D.D.C.).

Rather, petitioner asserts (Pet. Br. 7–18) that he was born a citizen by virtue of the second clause of R.S. 2172, which grants citizenship to the "*children of persons who now are,* or have been, citizens of the

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Kong Din Quong v. *Haff*, 112 F. 2d 96 (C.A. 9), certiorari denied, 311 U.S. 706; *Hom Ark* v. *Carr*, 105 F. 2d 607, 608 (C.A. 9); *Wong You Henn* v. *Brownell*, 207 F. 2d 226, 227 (C.A. D.C.).

[5] R.S. 1993 was amended by the Act of May 24, 1934, to provide for citizenship to children "*hereafter* born" abroad whose "father or mother", or both, were citizens at the time of the birth of the children (emphasis added), but the amendment was thus made solely prospective in application. 48 Stat. 797; S. Rep. No. 865, 73d Cong., 2d Sess., and H. Rep. No. 131, 73d Cong., 1st Sess., at pages 1 and 2, respectively; *Lee Chuck Ngow* v. *Brownell*, 152 F. Supp. 426, 427 (E.D. Wisc.). See *supra*, pp. 3–4; *infra*, pp. 49 ff.

R.S. 1993 and R.S. 2172 were expressly repealed by Section 504 of the Nationality Act of 1940, 54 Stat. 1137, 1172.

United States" (emphasis added). He argues (Pet. Br. 8, 10–11) that the word "persons", means "any person", and also that the clause must be given prospective application from its re-enactment in 1874 to at least the date of his birth in 1906. Neither contention finds support in the language of the statute or in the various constructions adopted by the commentators and courts.

1. *The words, "persons who now are * * * citizens," require both parents to be citizens.*

(*a*) In both the first and second clauses of the 1802 Act (re-enacted as R.S. 2172) Congress used the plural, "persons." This use of the plural seems to have been deliberate. As we have indicated (*supra*, pp. 16–19), the 1802 Act was, in essence, a re-enactment of the provisions of Section 3 of the 1795 Act, which in turn was a re-enactment of the 1790 Act. Section 3 of the 1795 Act also conferred citizenship upon "the children of *persons* duly naturalized", and upon the foreign-born "children of *citizens* of the United States" (emphasis added). Compare 1 Stat. 104 and 415, with 2 Stat. 155. As early as 1790, sentiment was expressed in Congress that provision ought to be made for the benefit of foreign-born children of *"American parents"* (emphasis added). 1 Annals of Congress, 1st Cong., 1st Sess., at p. 1121. The plural was likewise used in the legislative reports on the 1802 Act. Section 4 of that Act is an almost verbatim copy of the Senate Committee Report which used the plural, "persons". See the Senate Report, "Amendments reported by the committee, to bill,

naturalization, March 18, 1802", 7th Cong., 1st Sess. On March 26, 1802, the Senate Committee reported out certain other amendments, not here important, but the Committee was basically satisfied with Section 4 of the bill (the provision pertinent to this case, see *supra*, p. 18). See the Senate Report, March 26, 1802, 7th Cong., 1st Sess.[6] The House of Representatives and the Senate fully considered the 1802 naturalization bill prior to its passage on April 14, 1802, and were substantially satisfied with Section 4 as reported out of the Senate Committee on March 18, 1802.[7] See Senate Journal, 1799–1805 (1821 ed.), pp. 191, 193, 194, 195, 196–197, 201, 202–203, 209, 211, 213; House Journal, 7th Cong., 1st and 2d Sess., pp. 70–71, 121, 123, 127, 129, 184, 187–188, 190, 191, 193–194, 200–201.

(*b*) Although our research has been unable to discover any judicial decisions construing the second clause of the 1802 Act (re-enacted in R.S. 2172),

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[6] There were no House reports accompanying the 1802 Act. The Senate reports are not bound, and may be found in the Archives of the United States.

[7] The only real change which was made in Section 4, as reported out of the Senate Committee on March 18, 1802, was that the proviso prohibiting citizenship status to those children whose fathers renounced their United States citizenship during the infancy of their children was eliminated from the enactment. The Committee's version of the proviso was that "the right of Citizenship shall not descend to persons whose fathers have never resided within the United States or who having been Citizens of the United States, shall have renounced that character during the infancy of such children." Only the first portion of this proviso—precluding the descent of citizenship "to persons whose fathers have never resided within the United States"—was enacted into law. See 2 Stat. 155.

legal scholars who studied that clause apparently came to the conclusion that "children of persons" meant children of citizen parents (both mother and father), or children of citizen *fathers* alone. In the 14th edition of 2 Kent, *Commentaries*, edited by John Gould (1896), the following construction of the second clause of the 1802 Act was offered (p. 53):

> This clause is certainly not prospective in its operation, whatever may be the just construction of the one preceding it. It applied only to the children of persons who *then were* or *had been* citizens [emphasis in original]; and consequently the benefit of this provision narrows rapidly by the lapse of time, and the period will soon arrive when there will be no statutory regulation for the benefit of children born abroad, of American parents, and they will be obliged to resort for aid to the dormant and doubtful principles of the English common law. *The proviso annexed to this last provision seems to remove the doubt arising from the generality of the preceding sentence, and which was, whether the act intended by the words, "children of persons," both the father and mother, in intimation of the statute of 25 Edw. III, or of the father only, according to the more liberal declaration of the statute of 4 Geo. II.* The provision also differs from the preceding one, in being without any restriction as to the age or residence of the child; and it appears to have been intended for the case of the children of natural-born citizens, or of citizens who were original actors in our Revolution, and therefore it was more compresensive

and more liberal in their favor. [Emphasis added.]

It should be noted that this is a liberal interpretation of the clause. The view is that, since the proviso following and modifying the second clause operates to deny citizenship to foreign-born children whose *fathers* have never resided in the United States, "persons" in the second clause may mean the *father* alone. See, also, Binney, *The Alienigenae of the United States,* 2 American Law Register 193, 207–208 (February 1854). Since petitioner's father is not now and never was a United States citizen, regardless of whether or not the second clause of the 1802 Act (re-enacted in R.S. 2172) is prospective in application so as to cover petitioner's case, he cannot derive any benefit from that clause.

(*c*) Petitioner seeks to avoid the plural language in the second clause of R.S. 2172, and the historical connection of that provision with the *father's* citizenship, by arguing that the same word, "persons," used in the first clause of R.S. 2172, *supra,* p. 2, has been interpreted to mean "either father or mother, and that a mother is enabled to pass citizenship to her children through her naturalization in the United States even though the father is an alien" (Pet. Br. 9). In support of this construction, petitioner cites four district court decisions and a 1929 opinion of the Attorney General of the United States. These authorities are, however, inapposite.

In *United States ex rel. Fisher* v. *Rodgers,* 144 Fed. 711 (E.D. Pa.) (1906), *In re Graf,* 277 Fed. 969

(D. Md) (1922); *In re Bishop*, 26 F. 2d 148 (W.D. Wash.) (1927), and *United States* v. *Kellar*, 13 Fed. 82 (S.D. Ill.) (1882), the natural fathers of the children, unlike the situation at bar, were dead. The respective alien mothers remarried United States citizens (*Bishop*, *Kellar*) or husbands who subsequently became naturalized United States citizens (*Fisher*, *Graf*). Since the mothers were married to citizen-husbands between February 10, 1855, and September 22, 1922 (the date of the Cable Act, providing that women retained their own nationality on marriage), the mothers were held to be citizens under R.S. 1994, which conferred citizenship upon "(a)ny woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized."[*] See *Kelly* v. *Owen*, 7 Wall. 496. When the courts declared the children in question to be citizens, not only were the natural mother and the stepfather United States citizens, but the mother was the only living natural "parent"—a situation at variance with that in the present case. *Fisher*, *supra*, 144 Fed. at 712; *Graf*, *supra*, 277 Fed. at 970; *Bishop*, *supra*, 26 F. 2d at 148–149; *Kellar*, *supra*, 13 Fed. at 84–85. Petitioner's claim that these authorities support the proposition that citizenship may be derived through the mother "even

[*] R.S. 1994 was a substantial re-enactment of Section 2 of the Act of February 10, 1855, 10 Stat. 604. R.S. 1994 was repealed by Section 6 of the Act of September 22, 1922 (the Cable Act), 42 Stat. 1021–1022. The 1855 Act was based upon the Act of 7 & 8 Victoria, c. 66 (1844). Van Dyne, *Citizenship of the United States* (1904 ed.), pp. 119–120.

though the father is an alien" (Pet. Br. 9) overlooks the simple fact that the natural father in each of the cited cases was dead. The conclusion of the courts was that the child should not be prevented from taking the citizenship of the only parent he had at the time. In *Citizenship of R. Bryan Owen,* 36 Op. Atty. Gen. 197 (1929), the alien father of the child had died subsequent to the naturalization of the mother. Attorney General Mitchell pointed out that, whatever the status of the child at the time of his mother's naturalization, "there can be, in my opinion, no doubt that he is now a citizen of the United States by reason of *his father's death* * * *" (emphasis added). *Id.* at 203. In sum, the authorities cited by petitioner have held, in construing the first clause of R.S. 2172, that "persons" in that clause means "mother" only when the father of the child is dead, and the mother subsequently becomes a citizen (by naturalization, or by marriage to a citizen under R.S. 1994) during the minority of the child—a situation not present in the instant case.

In several other cases where the courts have held that a child could derive citizenship through his mother (as a "person" under the first clause of R.S. 2172), they were careful to point out that the marital relationship with the alien husband had terminated (*i.e.,* by death or divorce) and the custody of the minor child was in the hands of the natural mother. In such cases, the minor child, if dwelling within the United States, became a citizen through the first clause of R.S. 2172 on the acquisition of United States citi-

zenship by his mother. See, *e.g.*, *Petition of Drysdale*, 20 F. 2d 957, 958 (E.D. Mich.); Van Dyne, *Citizenship of the United States* (1904 ed.), p. 118; Cockburn, *Nationality* (1869 ed.), p. 213.* See also *infra*, pp. 45–47, 52–55. But none of these constructions aids the petitioner whose parents had not terminated their marital relation during his minority.

The first clause of R.S. 2172 has been interpreted to allow derivation of citizenship through the father alone, despite the fact that the plural words are used—"children of persons". *In re Citizenship Status of Minor Children, etc.*, 25 F. 2d 210 (D.N.J.) (1928); Foreign Relations 1890, p. 301; H. Doc. No. 326, 59th Cong., 2d Sess., pp. 31, 33–35; Cockburn, *Nationality* (1869 ed.), p. 40. See also the Congressional debates on the Cable Act of 1922 (42 Stat. 1021), 62 Cong. Rec. 9044; *Zartarian* v. *Billings*, 204 U.S. 170,

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*After the adoption of Section 5 of the Act of March 2, 1907, which conferred citizenship upon a child whose "parent" became a United States citizen through naturalization proceedings or through "resumption" of United States citizenship lost through marriage of a citizen woman to an alien husband, "parent" was generally construed to mean that parent—either mother or father—having legal custody over the minor child. *In re Lazarus*, 24 F. 2d 243, 244 (N.D. Ga.); *Roa* v. *Collector of Customs*, 23 Philippine Rep. 315, 341; 3 Hackworth, *Digest of International Law* (1942 ed.), at p. 79; *Citizenship of R. Bryan Owen*, 36 Op. Atty. Gen. 197, 200, 201 (1929); *Citizenship of Foreign-born Minor Child*, 37 Op. Atty. Gen. 90, 92–94 (1933). During the debates on the Cable Act of 1922, 42 Stat. 1021, Congressman Johnson of Washington pointed out that "parent" in Section 5 of the 1907 Act refers to the "mother" only "in the event of the death of the father." 62 Cong. Rec. 9057. The 1907 Act, and its application to the instant case, are discussed, *infra*, pp. 37 *ff*.

174–175; 2 Kent, *Commentaries* (14th ed., 1896), pp. 52–53.[10] This view is understandable since it was not until the Act of May 24, 1934, 48 Stat. 797, that women achieved equality with men in citizenship matters for themselves and their children. See S. Rep. No. 865, 73d Cong., 2d Sess., and H. Rep. No. 131, 73d Cong., 1st Sess.; 2 Hyde, *International Law* (2d rev. ed., 1945), pp. 1075–1076. Although some authorities took the position that the first clause of R.S. 2172 required both parents to become citizens before the child could derive citizenship through them (Webster, *Law of Naturalization* (1895 ed.), p. 81; see *United States ex rel. Fracassi v. Karnuth*, 19 F. Supp. 581, 582 (W.D. N.Y.), that view did not really conflict with the other authorities which recognized that a minor child could derive citizenship through the naturalization of his father—at least during the period from 1855 to 1922, for during that period the citizenship of the husband, whether by naturalization or otherwise, conferred citizenship upon his wife under R.S. 1994. Seen fn. 8, *supra*, p. 27.

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[10] Since Section 2 of the Act of March 26, 1804, 2 Stat. 292, provided for the granting of United States citizenship to "the widow and the children" of an alien who had declared his intention of becoming a United States citizen, etc., but who had died prior to being "actually naturalized", Chancellor Kent noted that perhaps the first clause of the 1802 Act required only the "father" to be naturalized in order to confer citizenship upon the minor child. He pointed out that that "provision [Section 2 of the 1804 Act] shows that the naturalization of the *father* was to have the efficient force of conferring the right on his children." 2 Kent, *Commentaries* (14th ed., 1896), at pp. 52–53.

To summarize: Three constructions have been placed upon the term "children of persons" appearing in the first clause of R.S. 2172: (1) that "persons" applies to and includes both parents—mother and father; (2) that "persons" means the father only; (3) that "persons" means the mother, alone, only in those instances where there has been a termination of the marital relationship with the alien husband, with legal custody of the child in the mother, and the mother becomes naturalized during the minority of the child. As applied to the instant case, none of these readings will help the petitioner in construing "persons" in the second clause of R.S. 2172 to mean his mother alone, since his father was living and unnaturalized at the time of his birth in Italy and thereafter.[11]

Insofar as petitioner speaks (Br. 20) of "giv[ing] to men as a class greater political rights than to women as a class" his plea is obviously addressed to the wrong forum. It merely reiterates an old complaint concerning the inferior legal and political status of women, which persisted until very recent times. The common law upheld a concept of family

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[11] Petitioner's reliance upon *United States* v. *Sanders*, 27 Fed. Cas. No. 16,220 (C.C.D. Ark.) (1847), for the proposition that "in some circumstances citizenship descended through the mother as well as through the father" (Pet. Br. 9), is misplaced. The *citizenship* of the person there in question was not involved or discussed. The court merely pointed out that, for purposes of determining its jurisdiction under a United States statute, the character of the child—whether white or Indian—would be determined by the character of its mother, not the father. *Id.* at pp. 951–952. Moreover, that case was decided before the 1855 Act was passed.

unity in such matters as property, voting, and citizenship, with the husband the spokesman for the unit. This conception of family unity prevailed until the emancipation of women was fully achieved. This view of family unity, reflected in the citizenship statutes until 1934, was expounded in this Court's leading decision of *Mackenzie* v. *Hare,* 239 U.S. 299.

This explains why the early citizenship statutes and R.S. 2172 spoke of the children "of persons" and why the 1855 law and R.S. 1993 spoke of the children of "fathers". In the legislative climate of the statutory enactments of 1802, 1855, and 1874, it is inconceivable that Congress intended to confer citizenship status on a child born abroad to an American mother and an alien father. Whether such a dispensation comports with present day attitudes is not relevant. Congress chose not to grant citizenship at birth through the mother until 1934 and then made the grant prospective only (*supra,* pp. 3–4, fn. 5, p. 22, *infra,* pp. 49 *ff.*). When petitioner was born outside the United States, citizenship could come only through the father and, since his father was an alien, petitioner was an alien.

2. *The second clause of R.S. 2172 was not prospective in application.*

To succeed in his claim under R.S. 2172 petitioner must establish not only that "persons", as used in the second clause of the section, can mean "mother", but also that the second clause is prospective in application and, hence, operates to confer benefits upon him. However, this contention (Pet. Br. 10–18) runs counter not only to the interpretation placed upon the sec-

ond clause of R.S. 2172 by the authorities, but also to the language, purpose, legislative history, and application of R.S. 1993, the companion provision which was first enacted in 1855.

As discussed above in connection with the background of the statutes (*supra*, pp. 16–21), it is clear that when Congress passed the Act of 1855 (subsequently R.S. 1993), it believed that the second clause of the Act of 1802 (subsequently R.S. 2172) was not prospective in operation. This interpretation was deemed required by the language of the second clause of the 1802 Act, "children of persons who *now are*, or *have been*, citizens of the United States."[12] The 1855 enactment was retrospective as well as prospective, reading in part, "[t]hat persons *heretofore born or hereafter to be born*, out of the limits and jurisdiction of the United States * * *" (emphasis added). See 10 Stat. 604. It thus served to rectify a recognized past defect in the second clause of the 1802 Act.[13] The 1855 Act did not affect derivative rights of citizenship through the naturalization of the parents of minor children, as provided for in the first

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[12] Since this language is not in the first clause of R.S. 2172, that clause was construed to operate prospectively. *Boyd* v. *Nebraska ex rel. Thayer*, 143 U.S. 135; *Zartarian* v. *Billings*, 204 U.S. 170.

[13] This Court pointed out in *United States* v. *Wong Kim Ark*, *supra*, 169 U.S. at 674, that "[i]t thus clearly appears that, during the half century intervening between 1802 and 1855, there was no legislation whatever for the citizenship of children born abroad, during that period, of American parents who had not become citizens of the United States before the act of 1802." See also *Weedin* v. *Chin Bow*, 274 U.S. 657, 663–664.

clause of the 1802 Act; it dealt only with remedying the defect in the second clause of the 1802 Act, with respect to the citizenship of children born abroad whose parents (or fathers) were citizens at the time of their birth. This was the law after 1855.

Moreover, the 1855 Act made crystal clear that citizenship was to come through the father alone. In fact, Congressman Cutting who proposed the 1855 legislation, specifically pointed out this limiting feature during debate (32 Cong. Globe 170, 33d Cong., 1st Sess.):

> In the reign of Victoria, in the year 1844, the English parliament provided that the children of English mothers, though married to foreigners, should have the rights and privileges of English subjects, though born out of allegiance. *I have not, in this bill, gone to that extent, as the House will have observed from the reading of it.* [Emphasis added.]

Throughout the legislative history of the naturalization and citizenship legislation subsequent to the 1874 re-enactments of the 1802 and 1855 Acts, Congress took it for granted that the second clause of R.S. 2172 was not prospective, by expressly pointing out that the citizenship status of foreign-born children was determined by the citizenship of their fathers, *i.e.*, that R.S. 1993 was the exclusive statute which applied to the situation of those foreign-born children. In the House Report which accompanied the Cable Act of 1922 (42 Stat. 1021–1022), the following observation was made by the committee (H. Rep. No. 1110, 67th Cong., 2d Sess., at p. 3):

> This bill in no wise affects the status of children. Those born here are citizens of the United States, under the Constitution, regardless of the allegiance of their parents. Those born abroad will, *as heretofore, take the nationality of their fathers.* [Emphasis added.]

See, also, 62 Cong. Rec. 9059; H. Doc. No. 326, 59th Cong., 2d Sess., at p. 77. And in both the House and Senate Committee reports which accompanied the Act of May 24, 1934 (48 Stat. 797), the reports specifically pointed out (H. Rep. No. 131, 73d Cong., 1st Sess., and S. Rep. No. 865, 73d Cong., 2d Sess., at pp. 2 and 1, respectively):

> By the present law citizenship by birth outside the United States is derived *only through the American father.* [Emphasis added.]

The Committee report declared that the purpose of the amendment was "to establish complete equality between American men and women in the matter of citizenship for themselves and for their children".

Thus, the view of Congress, from the remedial legislation in 1855 down to 1934, was that the second clause of the 1802 Act, as re-enacted in R.S. 2172, was not prospective, but that the citizenship of foreign-born children of persons born after 1874 (at the least) turned upon the citizenship of their fathers at the time of their birth.

This Court as well as other courts and authorities have expressly taken the position that the second clause of the 1802 Act (as re-enacted in R.S. 2172) was not prospective in operation. *United States* v.

Wong Kim Ark, 169 U.S. 649, 673; *Weedin* v. *Chin Bow*, 274 U.S. 657, 663–664; *Ying* v. *Cahill*, 81 F. 2d 940, 941 (C.A. 9); *United States ex rel. Guest* v. *Perkins*, 17 F. Supp. 177, 179 (D. D.C.); *D'Alessio* v. *Lehman*, 183 F. Supp. 345, 346–347 (N.D. Ohio); 2 Kent, *Commentaries* (14th ed., 1896), p. 53. In *United States* v. *Wong Kim Ark*, *supra*, the Court pointed out (169 U.S. at 673):

> But the provision concerning foreign-born children [the second clause of R.S. 2172], being expressly limited to the children of persons who then were or had been citizens, clearly did not include foreign-born children of any person who became a citizen since its enactment. * * * Mr. Binney's paper, as he states in his preface, was printed by him in the hope that Congress might supply this defect in our law.[14]

Finally, it is obvious that if petitioner's construction of R.S. 2172 were adopted there would be a direct conflict between R.S. 2172 and R.S. 1993, since the foreign-born children of "persons" (including *mothers*) who were citizens while R.S. 2172 was still on the books would be citizens under R.S. 2172, while R.S. 1993 confers citizenship only upon those foreign-born children whose *fathers* were citizens at the time of their birth, the father having resided in the United States prior to the child's birth. Petitioner's proposed construction that "persons" in R.S. 2172 could mean "mother" alone would thus conflict with R.S. 1993, making the "fathers" the focal point of citizenship.

[14] This Court's opinion in *Weedin* v. *Chin Bow*, *supra*, devotes considerable space to Mr. Binney's article and the need for the 1855 Act.

The duty of the courts is to "reject any construction which would make one section inconsistent with another relating to the same general subject." *United States* v. *Kellar*, 13 Fed. 82, 83–84 (S.D. Ill.). Moreover, petitioner's view would mean that citizenship could be transmitted by a mother who had never resided in the United States prior to the birth of the child abroad, since no prerequisite of prior residence appears in R.S. 2172. Such a consequence would be contrary to the explicit requirement of prior residence which appears in R.S. 1993 and in every other enactment that has dealt with this subject since the birth of the Republic. See *Weedin* v. *Chin Bow, supra*.[15]

II. PETITIONER DID NOT BECOME A CITIZEN UNDER SECTION 5 OF THE ACT OF MARCH 2, 1907.

Sections 3 and 5 of the Act of March 2, 1907, 34 Stat. 1228–1229, provided:

> SEC. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

[15] Petitioner's argument (Br. 19–20) that the requirement of prior residence in the United States by the father can be satisfied by residence of an alien father is fallacious. It is abundantly clear that this prerequisite was added in order to limit the capacity to transmit citizenship to *citizen* fathers who had previously resided in the United States. See *Weedin* v. *Chin Bow*, 274 U.S. 657.

> SEC. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided*, That such naturalization or resumption takes place during the minority of such child: *And provided further*, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

Petitioner's mother, a native citizen, and his father, an Italian national, were married in the United States in 1905—prior to the adoption of the 1907 Act. Petitioner contends (Pet. Br. 22–23) that his mother's citizenship was "in abeyance" during her visit to Italy in 1906, and that, "upon her resumption of residence" in the United States in 1906, the "petitioner became a citizen under the provisions of Section [5] of the Act of March 2, 1907." The court of appeals, however, correctly held that petitioner's mother did not lose her United States citizenship on her marriage to an alien prior to the adoption of the 1907 Act, and that, therefore, "there could be no later resumption of citizenship by which plaintiff could claim a derivative naturalization" (R. 55). Moreover, even if it be assumed for the sake of argument that petitioner's mother lost her citizenship on her marriage to an alien, the 1907 Act (assuming its applicability to events which had all occurred before its enactment) required that, in order for the wife to "resume" her United States citizenship, and hence confer citizenship upon her minor child at the time of

such resumption, there would have to be a termination of the marital relationship with the alien husband. The Act did not confer derivative citizenship upon a minor child whose mother merely resumed her "residence" in the United States.

A. PETITIONER'S MOTHER COULD NOT "RESUME" HER UNITED STATES CITIZENSHIP IN 1906 BECAUSE SHE DID NOT LOSE HER CITIZENSHIP ON HER MARRIAGE TO AN ALIEN IN 1905, OR THEREAFTER

1. In *Shanks* v. *Dupont*, 3 Pet. 242 (1830), this Court held that a citizen woman did not lose her United States citizenship on her marriage to an alien. The Court said (3 Pet. at 246):

> * * * [M]arriage with an alien, whether a friend or an enemy, produces no dissolution of the native allegiance of the wife. It may change her civil rights, but it does not affect her political rights or privileges. The general doctrine is, that no persons can, by any act of their own, without the consent of the government, put off their allegiance, and become aliens. If it were otherwise, then a *feme* alien would, by her marriage, become, *ipso facto*, a citizen, and would be dowable of the estate of her husband; which is clearly contrary to law. * * *

See also, 2 Kent, *Commentaries* (14th ed., 1896), p. 49. However, the rationale of the *Shanks* case was weakened when Congress in 1855 and 1868 enacted statutes which provided that (1) an alien wife became a citizen of the United States on her marriage to a citizen husband, and that (2) since the "right of expatriation is a natural and inherent right of all peo-

ple * * *, any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government." See Section 2 of the Act of February 10, 1855, 10 Stat. 604; Preamble and Section 1 of the Act of July 27, 1868, 15 Stat. 223, 224, re-enacted in 1874 as R.S. 1999; *Mackenzie* v. *Hare*, 239 U.S. 299, 309; *Savorgnon* v. *United States*, 338 U.S. 491, 497–8; *In re Wohlgemuth*, 35 F. 2d 1007, 1008 (W.D. Mich.); *Pequignot* v. *City of Detroit*, 16 Fed. 211, 213–214 (E.D. Mich.).

With respect to the period between this legislation and the passage of the Expatriation Act of 1907, there have been three views on the question of whether a woman lost her citizenship on her marriage to an alien. Relying largely on the fact that there was no statute expressly "denationalizing" women who married aliens, some have held that a woman did not lose her United States citizenship in such circumstances, even though she left the United States and took up domicile with her husband abroad. *E.g.*, *Petition of Zogbaum*, 32 F. 2d 911, 912–913 (D. S. Dak.); see *Citizenship*, 15 Op. Atty. Gen. 599, 601 (1877); *Case of Mrs. Preto and Daughter*, 10 Op. Atty. Gen. 321, 322–323 (1862). Others have held that marriage to a foreigner, even without a change of domicile to another country, resulted in a loss of the woman's United States citizenship. *In re Page*, 12 F. 2d 135 (S.D. Cal.); *In re Krausmann*, 28 F. 2d 1004 (E.D. Mich.); *In re Wohlgemuth*, 35 F. 2d 1007, 1008 (W.D. Mich.); *Pequignot* v. *City of Detroit*, 16 Fed. 211, 217

(E.D. Mich.); *see Jennes* v. *Landes,* 84 Fed. 73, 75 (D. Wash.). In the eyes of some of these courts, the 1907 Act—providing for an immediate forfeiture of citizenship on marriage to an alien husband—was merely "declaratory" of the common law then existing.[16]

A third group of authorities, which constitutes the weight of authority, holds that marriage alone to an alien did not work a loss of citizenship, but that if a change of domicile to another country accompanied the marriage there would be a forfeiture of citizenship on the part of the woman. *Ruckgaber* v. *Moore,* 104 Fed. 947, 948–949 (E.D. N.Y.), affirmed, 114 Fed. 1020 (C.A. 2); *In re Fitzroy,* 4 F. 2d 541, 542 (D. Mass.); *Watkins* v. *Morgenthau,* 56 F. Supp. 529, 530–531 (E.D. Pa.); *Wallenburg* v. *Mo. Pac. Ry. Co.,* 159 Fed. 217, 219 (C.C. D. Neb.); *Comitis* v. *Parkerson,* 56 Fed. 556, 559–560 (E.D. La.), writ of error dismissed *sub nom. Comitiz v. Parkerson,* 163 U.S. 681; *In re Lynch,* 31 F. 2d 762 (S.D. Cal.); *In re Wright,* 19 F. Supp. 224, 225 (E.D. Pa.); see *Citizenship,* 13 Op. Atty. Gen. 128, 129–130 (1869); *Case of*

[16] Congressman Perkins pointed out, during debate on the 1907 Act, that the bill was "in large part" declaratory of "the law as it now is.* * * [because] a woman who marries a foreigner takes the citizenship of her husband." See 41 Cong. Rec. 1464, 1465. This observation, however, is incomplete, for up to 1907, statutory provision was made only for an alien woman to take the citizenship of her United States citizen husband. See R.S. 1994. As we have noted, there was a split of opinion whether a citizen woman *lost* her citizenship on marriage to an alien. Thus, the 1907 Act could not be declaratory of "the law as it now is." At most, it was only declaratory of those few cases which held that a citizen woman lost her citizenship on her marriage, without more, to an alien.

Madame Berthemy, 12 Op. Atty. Gen. 7, 9 (1866); see also *Petition of Drysdale*, 20 F. 2d 957, 958 (E.D. Mich.). The cases in this third group, apart from embodying the decided weight of authority with respect to the period prior to the 1907 Act, have the added support that the requirement of a change of domicile outside the United States, accompanied by marriage to a foreigner, discloses a more deliberate and unequivocal expression of intention to expatriate oneself than does marriage, without more. *In re Wright, supra*, 19 F. Supp. at 225; *Ruckgaber* v. *Moore, supra*, 104 Fed. 947, 948–949, affirmed, 114 Fed. 1020 (C.A. 2); *Comitis* v. *Parkerson, supra*, 56 Fed. at 562–563.[17] And perhaps more significantly, this Court suggested in *Mackenzie* v. *Hare*, 239 U.S. 299, that it would not recognize that mere marriage to a foreigner prior to the 1907 Act resulted in a loss of the wife's citizenship; the focal point of the decision in *Mackenzie* was that the woman in question, who married an alien subsequent to the 1907 Act, voluntarily entered into a marital relationship "*with notice of the consequences*" (emphasis added). *Id.* at 312. See 2 Hyde, *International Law* (2d rev. ed., 1945), p. 1115, fn. 3. Since there was no legislation on this subject in 1905, when petitioner's mother married an alien, there was no legislative notice of a loss of citizenship as a consequence of her marriage.

2. Under either the first or the third view of the status of American women who married foreigners

[17] The court in *In re Lynch*, *supra*, 31 F. 2d 762, pointed out that with such a change of domicile abroad "the wife adopts the nationality of her husband."

before the 1907 Act—together constituting the very great weight of authority, and the preferable position—petitioner's mother did not lose her citizenship on the marriage to petitioner's father in the United States in 1905. There was, of course, no change of domicile when petitioner's family traveled to Italy in 1906, the trip being for a visit only. Hence, petitioner's mother never had occasion to "resume" citizenship under the 1907 Act or otherwise.

Section 3 of the 1907 Act, *supra*, p. 3, deprived "any American woman"—whether she was native-born or naturalized—of her citizenship on her marriage, without more, to an alien, and provided that, on the termination of the marital relationship, the woman could "resume" her United States citizenship on fulfilling certain requirements.[18] And in Section 5

[18] Sections 6 and 7 of the Cable Act of 1922, 42 Stat. 1021–1022, expressly repealed Sections 3 and 4 of the 1907 Act, as well as R.S. 1994. Section 3 of the Cable Act provided, *inter alia*, that an American woman did not lose her citizenship on marriage to a foreigner unless she renounced her United States citizenship before a court having jurisdiction over the naturalization of aliens, or unless she married a foreigner who was, himself, ineligible to citizenship. Section 4 of the Cable Act provided for a short form of naturalization for those American women who had lost their citizenship on marriage to a foreigner who was eligible to citizenship. By 1931, the last remnants of the effect of marriage on loss of citizenship were eliminated. See Act of March 3, 1931, 46 Stat. 1511–1512; Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. of Pa. L. Rev. (1950) 25, 47–49.

By the Act of May 24, 1934, 48 Stat. 797, R.S. 1993 was amended to provide for United States citizenship of those foreign-born children whose mothers or fathers were citizens at the time of the birth of such children. The Act was solely prospective in operation and was enacted "to complete the provisions of the Cable Act of 1922 so as to establish complete

of the Act, a foreign-born minor child of such a marriage could derive citizenship on the naturalization or "resumption of American citizenship" by the parent, provided such naturalization or "resumption of American citizenship" took place during the child's minority.

Plainly, petitioner can derive no benefit from Section 5. Neither parent was naturalized during his minority, and his mother never "resumed" her United States citizenship because, as indicated *supra*, pp. 39–43, she never lost that citizenship. By Section 3, Congress provided, on the termination of the marriage, for the resumption of citizenship which was lost as a result of that marriage; but where citizenship was not lost, as here, there was no citizenship to resume under the 1907 Act. H. Rep. No. 6431, 59th Cong., 2d Sess., pp. 1–2; 41 Cong. Rec. 1464, 1465; *Petition of Black*, 64 F. Supp. 518, 520 (D. Minn.).

Moreover, the operative events in petitioner's case—his mother's marriage to an alien, his birth abroad, his mother's return with him to this country—had all

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Footnote 18 continued from p. 43.
equality between American men and women in the matter of citizenship for themselves and their children." S. Rep. No. 865, 73d Cong., 2d Sess., and H. Rep. No. 131, 73d Cong., 1st Sess., at pp. 1 and 2, respectively. The 1934 Act followed the acceptance by this country of the convention on the Nationality of Women which was concluded at the Seventh International Conference of American States, December 26, 1933, in which Article 1 pointed out that "there shall be no distinction based on sex as regards nationality, in their legislation or in their practice." See 2 Hyde, *International Law* (2d rev. ed., 1945), at p. 1075; also, *supra*, pp. 3–4, and *infra*, pp. 49 *ff*.

occurred in 1905 and 1906, prior to the adoption of the 1907 Act. By the time that statute came onto the books, petitioner and his mother were back in this country living together with his father.

B. PETITIONER CANNOT DERIVE CITIZENSHIP FROM SECTION 5 OF THE 1907 ACT SINCE THERE WAS NO TERMINATION OF HIS MOTHER'S MARITAL RELATIONSHIP

Section 3 of the 1907 Act, *supra*, p. 3, expressly provided that a woman who lost her citizenship on marriage to a foreigner could not "resume" her United States citizenship until there had been a termination of the marital relationship. 34 Stat. 1228–1229. Since the marriage to an alien constituted an impediment to the continued existence of American citizenship on the part of the woman, it was logical for Congress to allow the woman to resume her United States citizenship when that impediment was removed by the ending of the marriage. In the debates which preceded the enactment of the 1907 legislation, Congressman Perkins, who sponsored the bill, pointed out that "where the marital relation has terminated—*which may either be by the death of her husband or by absolute divorce*—the woman shall have the right, either by returning to this country or by filing a declaration before proper officers, to retake her citizenship in the United States" (emphasis added). 41 Cong. Rec. 1464, 1465. The House Committee Report which accompanied the bill indicated that the wife could resume her citizenship "upon the termination of the marital relation." H. Rep. No. 6431, 59th

Cong., 2d Sess., pp. 1–2. See, also, 2 Hyde, *International Law* (2d rev. ed., 1945), at pp. 1116, 1119.

The mere fact (if it be a fact) that petitioner's mother and father, following family difficulties, lived apart for about six months after the petitioner was born, and that petitioner returned to the United States with his mother alone in 1906, did not bring about a "termination" of the marital relationship within the contemplation of the statute.[19] Even under the testimony of petitioner's mother, it is clear that the mother and father soon became reconciled, and they have lived together in the marital relationship down to the present time. There was thus no termination of the marital relationship by death of the husband, or divorce, or even by mutual separation with absolute custody of the child in the wife (see *United States ex rel. Guest* v. *Perkins*, 17 F. Supp. 177, 180–181 (D. D.C.). Therefore, even if it be assumed *arguendo* that petitioner's mother lost her citizenship on her marriage to an alien and it is also assumed that the 1907 Act could apply at all to petitioner, petitioner could not derive citizenship benefits under Section 5 of that Act because his mother could not resume her citizenship under that provision, the marital relation not having ended.

In any event, petitioner's mother and father were reconciled by the time the 1907 Act was passed, and the marital relationship has continued down to the present time. Since the 1907 Act certainly did not

[19] When petitioner was brought to the United States as an infant, he was declared as destined to his father (R. 37).

apply to family situations which no longer existed by the time of its adoption (see 41 Cong. Rec. 1466),[20] the marital difficulty of petitioner's parents before the passage of the Act is wholly immaterial for present purposes.

C. RESUMPTION OF RESIDENCE BY THE MOTHER WAS NOT A RESUMPTION OF CITIZENSHIP

Section 3 of the 1907 Act, *supra*, p. 3, allows the woman to resume her lost United States citizenship, and Section 5, *supra*, p. 3, confers citizenship upon a minor child whose "parent" becomes naturalized or resumes United States *citizenship*. The statute does not grant citizenship to a minor child whose parent merely resumes a *residence* in the United States. The Act speaks of a resumption of citizenship—not of residence.

Petitioner's complaint (Pet. Br. 23)—that if he is not allowed to benefit under the provisions of Section 5, then "a naturalized or an expatriated mother who resumed citizenship [is], by law, endowed with greater political right and with power to pass greater rights than a native-born mother who never lost her citizenship"—misses the point of the 1907 legislation. The 1907 Act took away the citizenship of all American women—whether native-born or naturalized citizens—on their marriage to aliens. Since marriage to an alien was, in legal effect, an impediment to continued

[20] When Congressman Perkins was asked whether Section 3 of the Act was retrospective, he replied "that no laws are presumed to be retrospective in the absence of express provision in the bill." 41 Cong. Rec. 1467.

United States citizenship, Congress made provision for a "resumption" of citizenship on the termination of the impediment, by compliance with certain requirements. That Section 5 of the 1907 Act granted citizenship to those foreign-born children whose expatriated mother resumed United States citizenship during the minority of the child (after termination of the marital relationship) did not confer greater political rights upon that mother as compared to a native mother who married an alien prior to 1907. An American woman, like petitioner's mother, who married an alien prior to the 1907 legislation, had greater political rights than her counterpart who married an alien when the 1907 Act was in effect, in the sense that she *retained* her citizenship while the counterpart *lost* hers. The 1907 Act sought to redress the balance by making special provision for the children of the denationalized woman once her alien marriage had ended.

Section 5 of the 1907 Act deals only with citizenship *acquired after birth through a parent's change of nationality,* and not with citizenship *at and by birth.* Petitioner's argument confuses these two separate concepts, and erroneously assumes that he can somehow fit within the statute although neither of his parents changed nationality after petitioner was born. As we have shown, his mother did not lose her American nationality and likewise did not reacquire it under the 1907 Act (or otherwise); his father has remained an Italian national to this day. Thus, there is no occasion for any rule of citizenship

by acquisition—the sole concern of Section 5 of the 1907 Act—to come into play.[21]

III. PETITIONER DID NOT BECOME A CITIZEN UNDER SECTION 2 OF THE ACT OF MAY 24, 1934

Section 2 of the Act of May 24, 1934, 48 Stat. 797, amended Section 5 of the Act of March 2, 1907, 34 Stat. 1228–1229, *supra*, to read as follows:

> SEC. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the natural-

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[21] When petitioner came to the United States in 1906 he was a child in the arms of his mother. He was admitted with his mother as a citizen, destined to his father in this country (R. 27–28, 37). However, since his admission as a citizen was in no sense a formal adjudication or considered determination of citizenship—as was the case in *Delmore* v. *Brownell*, 236 F. 2d 598, 600 (C.A. 3); *Lee Hon Lung* v. *Dulles*, 261 F. 2d 719, 723–724 (C.A. 9)—but merely an *ad hoc* ruling at the port, there was no requirement that the government rebut petitioner's claim of citizenship with clear and convincing evidence. And as the court below correctly pointed out (R. 55–56), "Finally, even if the action of Immigration officials * * * was sufficient to establish a *prima facie* case of plaintiff's citizenship, it was rebutted convincingly by the showing that the Immigration officers committed legal error in designating plaintiff as a citizen at the time of his entry." The error of immigration officers in recording status at the time of entry can hardly (as petitioner's brief suggests, p. 16) be regarded as a controlling, consistent administrative construction.

In addition, we point out that petitioner did not need a passport, visa, or other document when he came to the United States. See Gordon and Rosenfield, *Immigration Law and Procedure* (1959 ed.) 115, 206, 664, 667. His 1906 entry was unquestionably lawful. The deportation order in his case was not predicated upon any supposed illegal entry but upon petitioner's conviction in the United States for two crimes involving moral turpitude.

> ization of or resumption of American citizenship by the father or the mother; *Provided,* That such naturalization or resumption shall take place during the minority of such child: *And provided further,* That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States.

Thus, derivative citizenship through the naturalization or resumption of citizenship by the "parent" during the minority of the child, as provided in the 1907 Act, was amended to establish such derivative citizenship through the naturalization or resumption of citizenship by the "mother or the father." Petitioner contends (Pet. Br. 24–27) that, "by virtue of his mother's nationality and resumption of residence," he became a citizen five years after his entry into the United States "by the clear operation of the Act of May 24, 1934."

A. The same reasons which deny petitioner relief under Section 5 of the Act of March 2, 1907 (see *supra,* pp. 37–49), operate to deny him relief under Section 2 of the 1934 Act, for Section 2 was adopted only for purposes of "clarif[ying] the present uncertainties of the law [Section 5 of the 1907 Act]." S. Rep. No. 865, 73d Cong., 2d Sess., at p. 1; H. Rep. No. 131, 73d Cong., 1st Sess., at p. 2.[22] See also

[22] Section 2 of the 1934 Act amended the 1907 Act to provide that a minor child could not derive citizenship through the naturalization or resumption of citizenship of his father or mother until the child resided permanently in the United States for at least five years. The 1907 Act conferred citizenship "at

United States ex rel. Guest v. *Perkins*, 17 F. Supp. 177, 180 (D. D.C.); *Kletter* v. *Dulles*, 111 F. Supp. 593, 596, 597 (D. D.C.), affirmed, *sub nom. Kletter* v. *Herter*, 268 F. 2d 582 (C.A. D.C.), certiorari denied, 361 U.S. 936.[23] Petitioner cannot derive citi-

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Footnote 22 continued from p. 50.
the time such minor child [began] to reside permanently in the United States." 34 Stat. 1229.

The Senate and House Committee reports used identical language in pointing out that "Section 2 clarifies the present uncertainties of the law so that naturalization of an alien mother will confer United States citizenship upon her minor children born abroad who are admitted for permanent residence in the United States during their minority. The present law appears to confer United States citizenship upon such children but the uncertainty in the law makes necessary the clarifying language of the present bill." S. Rep. No. 865, 73d Cong., 2d Sess., and H. Rep. No. 131, 73d Cong., 1st Sess., at pp. 1 and 2, respectively.

[23] Several authorities expressly pointed out that, so long as the marital relation continued with an alien husband, naturalization of the "parent" did not mean the naturalization of the mother alone, for the purposes of Section 5 of the 1907 Act, and the naturalization of the mother in such circumstances would not confer citizenship upon her minor children under that section. *In re Citizenship Status of Minor Children, etc.*, 25 F. 2d 210 (D.N.J.); Congressional debate on the Cable Act of 1922, 62 Cong. Rec. 9044; 3 Hackworth, *Digest of International Law* (1942), p. 77; *Citizenship of R. Bryan Owen*, 36, Op. Atty. Gen. 197, 200 (1929). See *Kletter* v. *Herter*, 268 F. 2d 582 (C.A. D.C.), certiorari denied, 361 U.S. 936. As indicated *supra*, pp. 26–32, 45–47 and *infra*, pp. 52–55, it was generally recognized that where the marital relationship had ended through death of the husband (father) or through divorce, the acquisition of citizenship by the mother, who had custody over the minor child, operated to confer citizenship upon the minor child under R.S. 2172 or Section 5 of the 1907 Act. See, *e.g.*, *In re Lazarus*, 24 F. 2d 243, 244 (N.D. Ga.); *Petition of Drysdale*, 20 F. 2d 957, 958 (E.D. Mich.); *Roa* v. *Collector of Customs*, 23 Philippine Rep 315, 341; *Citizenship of R. Bryan Owen*, 36 Op. Atty. Gen. 197, 200 (1929); Van Dyne, *Citizenship of the United States* (1904 ed.), p. 118; Cockburn, *Nationality* (1869 ed.), p. 213.

zenship under Section 5 of the 1907 Act or Section 2 of the 1934 Act for the reasons we have already suggested: (1) His father never became a naturalized American citizen. (2) His mother never lost her citizenship and, hence, had no United States citizenship to "resume" under Section 3 of the 1907 Act or Section 2 of the 1934 Act. (3) If his mother had lost her citizenship on her marriage to an alien in 1905, there could be no resumption of her United States citizenship until there had been a "termination" of the marital relation, a fact not present in this case. (4) The 1907 and 1934 Acts do not confer citizenship upon a minor child whose mother "resumes" her *residence* in the United States, nor do they allow a woman to resume her citizenship merely upon such a resumption of residence; citizenship could come through the mother only if, having lost her citizenship through marriage to a foreigner, she "resumed" such citizenship on a "termination" of the marital relation.

B. In support of his claim of citizenship under Section 2 of the 1934 Act, petitioner relies upon a number of authorities: *Petition of Black,* 64 F. Supp. 518 (D. Minn.); *Petition of Drysdale,* 20 F. 2d 957 (E.D. Mich.); *United States ex rel. Guest* v. *Perkins,* 17 F. Supp. 177 (D. D.C.); *United States* v. *Kellar,* 13 Fed. 82 (S.D. Ill.); *Citizenship of Foreign-born Minor Child* 37 Op Atty. Gen. 90 (1933); and *Citizenship of R. Bryan Owen,* 36 Op. Atty. Gen. 197 (1929). These cases are, however, all distinguishable for the simple reason that the marital relationship of the parents had been terminated by death of the husband (father), divorce of the parties, or separation by mutual consent.

In *Petition of Black*, 64 F. Supp. 518 (D. Minn.), the court pointed out that, although the mother had not lost her United States citizenship on her marriage to a foreigner in 1929, the mother should, after returning to the United States and securing a divorce, be treated as though she had "resumed" her United States citizenship, so as to confer citizenship benefits upon her minor child. The court said (64 F. Supp. at 520):

> While Mrs. Black could not become naturalized in judicial proceedings and thereby bestow citizenship rights upon her alien child because she had never lost her American citizenship, she could, however, to all practical purposes, *resume her American citizenship by returning permanently to the United States and terminating the marriage relationship with her alien husband.* [Emphasis added.]

In like vein, in *Citizenship of Foreign-born Minor Child*, 37 Op. Atty. Gen. 90 (1933), the citizen mother did not lose citizenship on marrying a foreigner in 1923, but, after returning for permanent residence in the United States, the mother obtained an absolute divorce in Nevada from her husband and was awarded the custody of the minor child. Attorney General Mitchell pointed out that, insofar as the citizenship of the minor child was concerned, the mother should be treated as though she has resumed her United States citizenship lost on her marriage to a foreigner. *Id.* at 92, 94. But, again, there could have been no resumption of citizenship under Section 3 of the 1907 Act unless there had been a termination of the marital rela-

tion. Similarly, in *Petition of Drysdale*, 20 F. 2d 957 (E.D. Mich.) and *United States ex rel. Guest* v. *Perkins*, 17 F. Supp. 177 (D. D.C.), each of the mothers had lost her United States citizenship on marriage to a foreigner, but on returning to reside in the United States and on termination of the marital relation (by death of the husband in *Drysdale*; by mutual consent with custody of the child in the mother in *Guest*), the courts held that the children derived citizenship through the resumption of citizenship by the mothers while the children were minors.[24] In *United States* v. *Kellar*, 13 Fed. 82 (S.D. Ill.) and *Citizenship of R. Bryan Owen*, 36 Op. Atty. Gen. 197 (1929), the rule was reiterated that, where the father of the child is *dead* and the mother subsequently becomes a United States citizen (through naturalization proceedings, as in *Owen*; or through the operation of R.S. 1994 on her remarriage to a United States citizen between 1855 and 1922, as in *Kellar*), the child obtains derivative citizenship through R.S. 2172 or through Section 5 of the 1907 Act. But as we have already indicated, *supra*, pp. 26–31, 45–47, 49–52, this does not aid the petitioner whose alien father is still alive and whose parents' marital relation continued through petition-

[24] In *Drysdale*, the mother "resumed" her citizenship in 1901 when her husband (the father of the child) died. The child was then 17 years of age. The court pointed out that the mother could resume her citizenship since Section 3 of the 1907 Act, which provided for such resumption of citizenship, was "merely declaratory of the common law previously prevailing," and that, under the weight of authority, the foreign child took the citizenship of his mother on the death of his father. *Petition of Drysdale*, *supra*, 20 F. 2d at 958.

er's majority and until the present time.[25] The cardinal fact is that neither of petitioner's parents acquired or resumed American citizenship after he was born.

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[25] In *Kletter* v. *Dulles*, 111 F. Supp. 593 (D. D.C.), affirmed *sub nom. Kletter* v. *Herter*, 268 F. 2d 582 (C.A. D.C.), certiorari denied, 361 U.S. 936, which petitioner also cites (Pet. Br. 26), the child was born in Palestine of alien parents. In 1921, the plaintiff (the child) and his mother emigrated to the United States. In 1928, while the plaintiff was 17 years old, his mother became a naturalized United States citizen. The child subsequently returned to Palestine, and in 1935, he became a naturalized Palestinian. The court held petitioner's contention—that he became an American citizen through the naturalization of his mother even though his alien father was alive and there was no arrangement for his mother to have custody over him—to be "not without some doubt." *Id.* at. 597. This statement was prompted by the court's recognition of the fact that, on the one hand, Section 2 of the 1934 Act was enacted only to clarify the word "parent" in Section 5 of the 1907 Act to mean either "father or mother," thus adding color to plaintiff's claim of citizenship through the naturalization of his mother alone, while, on the other hand, there were administrative and judicial interpretations of the word "parent" to mean "father" alone, which would negate the plaintiff's claim. *Id.* at 597, 598. The court then went on to hold that, assuming plaintiff's construction of Section 5 of the 1907 Act to be correct (that he could derive citizenship through the naturalization of his mother alone), that derivative United States citizenship operated to destroy his Palestinian citizenship which he had acquired at birth, and that his subsequent Palestinian naturalization in 1935 was not only valid, but operated to expatriate the plaintiff under United States law. *Id.* at 598.

The *Kletter* case has no application to the instant one for the reason that neither of the petitioner's parents were naturalized, and neither of petitioner's parents resumed United States citizenship within the 1907 or 1934 Acts, so as to permit petitioner to claim a derivative citizenship through Section 5 of the 1907 Act. See *supra*, pp. 39–55.

IV. THE ALLEGED DENIAL BY A UNITED STATES CONSULAR OFFICER IN NAPLES, ITALY, OF A PASSPORT TO PETITIONER'S MOTHER FOR THE PURPOSE OF RETURNING TO THE UNITED STATES IN 1906 DOES NOT PRECLUDE THE GOVERNMENT FROM CONTESTING PETITIONER'S CLAIM OF UNITED STATES CITIZENSHIP

In the district court, petitioner's mother, Mrs. Maddelena Montana, testified that, after spending about a month and a half in Italy in early 1906, she desired to return to the United States. According to Mrs. Montana, she went to a "little town" (R. 22), accompanied by her parents, to obtain passports. The official on duty referred her to the United States consul in Naples. When she subsequently applied for a passport at the United States Consulate in Naples, the consul, according to her, "just took one look at me and he says, 'I am sorry, Mrs., you cannot in that condition.' 'You come back after you get your baby.'" (R. 23). Petitioner contends (Pet. Br. 28–30) that he "should be considered in being from the time of conception," that the alleged conduct of the United States consul in denying his mother a passport "encroached" upon his rights, and that the United States cannot take advantage of the misconduct of one of its officers "to deprive the petitioner of American nationality." In essence, petitioner is claiming that the alleged misconduct of the consul prevented him from being born in the United States, thus precluding natural-born citizenship status under the Fourteenth Amendment.

Regardless of what might be said with respect to estopping or preventing the government from relying upon the action or misconduct of officials to deprive

a person of his citizenship or incidents thereto (see *Lee You Fee* v. *Dulles*, 236 F. 2d 885 (C.A. 7), reversed on confession of error on other grounds, 355 U.S. 61; *Podea* v. *Acheson*, 179 F. 2d 306 (C.A. 2); *Dos Reis ex rel. Camara* v. *Nicolls*, 161 F. 2d 860 (C.A. 1)), it still must remain true that, in order successfully to advance "estoppel" or an allied theory, the claimant must show some initial misconduct on the part of governmental officials which is believed by the trier of fact. In the instant case, however, the trial judge, as fact finder, does not appear to have credited the claim that Mrs. Montana was denied the passport in question. He understood that petitioner was claiming estoppel, at least in part, but nevertheless dismissed the action at the conclusion of the case (R. 35, 39–40, 47). It is, of course, elementary that the fact-finding body, particularly in citizenship and allied cases, "need not accept uncontradicted testimony when good reasons appear for rejecting it, such as the interest of the witness, and improbabilities and important discrepancies in the testimony." *Yip Mie Jork* v. *Dulles*, 237 F. 2d 383, 385 (C.A. 9); *Flynn ex rel. Yee Suey* v. *Ward*, 104 F. 2d 900, 902 (C.A. 1); *United States ex rel. Gong Sik Ho* v. *Corsi*, 62 F. 2d 785, 786 (C.A. 2); *Lau Ah Yew* v. *Dulles*, 257 F. 2d 744, 746 (C.A. 9); *Wong Moon Jee* v. *Dulles*, 248 F. 2d 951, 952 (C.A. 1); *Wong Gong Foy* v. *Brownell*, 238 F. 2d 1 (C.A. 9). Petitioner's mother, with five other living children, all of whom were born in Chicago (R. 34–35), certainly had an interest, and a major one, in the outcome of petitioner's suit for

declaratory relief. The trial judge could have discounted her testimony on this score alone. See *Wong Moon Jee* v. *Dulles*, 248 F. 2d 951, 952 (C.A. 1); *Lau Ah Yew* v. *Dulles*, 257 F. 2d 744, 746 (C.A. 9); *Yip Mie Jork* v. *Dulles*, 237 F. 2d 383, 385 (C.A. 9).

Moreover, the testimony of petitioner's mother (R. 22–24), especially when appraised in context, does not indicate that she was actually *denied* a passport but rather, at most, that the consul suggested to her that she wait until her child was born before traveling back to the United States. She testified that she and her parents went to a "little town" for passports; that passports were issued to her parents but that she was directed to go to the American Consulate for her passport because the local office did not have her name; that two or three days later she and her mother went to the American Consulate in Naples; that on arriving at the consulate a man in a "uniform" took her into the consulate and introduced her to a "young man" and said that "he was the American Consul"; that she told the consul that she wanted to return "to my place where I was born"—that she wanted "to go back to the United States"; that the consul took "one look" at her and said, "I am sorry Mrs., you cannot in that condition," that she should come back after she delivered her baby; and that she returned "to the little home town"—Acerra—and lived there with her mother until petitioner was born about four months later (R. 22–24). This testimony is quite consistent with the consul's having *suggested* to Mrs. Montana that she wait for her child to be born; "you cannot in that con-

dition" (the words she ascribes to the consul) could quite easily mean no more than, "you're not well enough to travel from here to the United States in that condition and should wait until after the birth".

It seems incredible that the consul would have *denied* a passport to Mrs. Montana since, in 1906, there was no requirement for a citizen, on entering or returning to this country, to obtain a passport. (Indeed, in 1906 there were no documentary requirements—passports or visas—for citizens or for aliens.) Throughout most of the history of the United States, particularly that period between the Civil War and World War I, there was no requirement that a citizen obtain a passport on leaving or entering the United States. *Kent* v. *Dulles*, 357 U.S. 116, 123–124; see 3 Hackworth, *Digest of International Law* (1942 ed.), pp. 437, 526.[26] There would thus be no occasion for petitioner's mother to apply for a passport, save possibly the one now advanced by petitioner (Pet. Br. 30) that Italian law might have affected "those persons who wished to leave Italy." But the record is

[26] In 1815, Congress made it illegal for a citizen to "cross the frontier" into enemy territory, to visit any enemy camp within the United States or to board any enemy vessel in waters of the United States "without a passport first obtained" from the Secretary of State or his designate. Act of February 4, 1815, 3 Stat. 195, 199–200. Similar measures were imposed by the State Department during the Civil War. See *Kent* v. *Dulles*, 357 U.S. 116, 123. The Act of May 22, 1918, 40 Stat. 559, made it unlawful for a citizen to enter or leave the United States without a passport during wartime where the President, by proclamation, imposed additional restrictions on travel. See also H. Rep. No. 485, 65th Cong., 2d Sess.

barren of any requirement of Italian law that a passport was necessary, or that petitioner's mother thought that she had to have a passport for her return to the United States, and petitioner's briefs do not show any such requirement of Italian law. In any event, this is no reason to believe that if Italy required a passport the consul would have denied one, especially since it was unnecessary under American law. Petitioner seeks to sidestep this argument by contending that "this is an unusual forum * * * [for the government] to raise the argument for the first time." But this argument was advanced in the court below and, we submit, is properly before this Court now. Indeed, it is the petitioner who is strenuously urging an argument which was greatly played down in the district court. Prior to introducing her proof, counsel for petitioner informed the court (R. 47):

> Your Honor understands that while we do claim estoppel, *we are proceeding on pure law in this case. We are not relying on simple estoppel.* We think it is a consideration, but it is our position and very, a very carefully considered position that this man was under the law a citizen of the United States at the time he was born. [Emphasis added.]

The unlikelihood of a *denial of a passport* by the consul is further emphasized by Mrs. Montana's testimony that her father was a citizen of the United States, and that her parents—father and mother—obtained their respective passports in a "little town", but that, since the people there could not find her name, "they said * * * [that she] had to go to the

American Consul" to get her "passport" (R. 22, 24). The father, however, could not have obtained his American passport in the "little town", since, at that time, only "diplomatic or consular officers of the United States * * * and no other person" could issue or verify passports in foreign countries. R.S. 4075. The office in the "little town" would not be a diplomatic or consular office because the people there sent petitioner's mother to the "American Consul" for her passport (R. 22). If, however, the "little town" was a diplomatic or consular office of the United States, the sending of petitioner's mother to the "American Consul" for her "passport" would be unnecessary since the initial office would be permitted to issue the passport under R.S. 4075.[27] In sum, insofar as the testimony of Mrs. Montana indicates that she was *denied* a *passport*, it can properly be discounted as fantastic and incredible, both factually and legally, under well settled evidentiary standards. E.g., *Lau Ah Yew* v. *Dulles, supra,* 257 F. 2d at 746; *Yip Mie Jork* v. *Dulles, supra,* 237 F. 2d at 385; *Wong Moon Jee* v. *Dulles, supra,* 248 F. 2d at 952; *United States ex rel. Gong Sik Ho* v. *Corsi, supra,* 62 F. 2d at 786; *Flynn ex rel. Yee Suey* v. *Ward, supra,* 104 F. 2d at 902.

Finally, even if the claim of passport denial were accepted, the conduct on the part of the American

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[27] Also, if the mother had a passport when she left the United States, there would be no occasion for her to obtain another one in Italy, since a passport, at that time, was valid for one year. 3 Moore, *International Law Digest* (1906), Section 523, p. 977.

consul would be insufficient, as a matter of law, to estop the government from contesting petitioner's claim to citizenship, or as the court below pointed out (R. 55) "to grant citizenship to plaintiff." First, there is no showing that Mrs. Montana, who presumably did not have a passport when she left the United States since that passport would have been valid for a year and it would have been unnecessary to secure one in Italy, thought that she had to have a passport in order to return to the United States. Even if the consul refused her a passport, she would not have been prevented from returning to the United States—either legally, since no passport was required at that time of a citizen seeking entry into the United States, or factually, because no showing was made that she believed that she needed one for her return to this country. Secondly, even if the consul had granted the passport, there would have been no assurance, of course, that petitioner would have been born in the United States. Petitioner's mother might not have left Italy at that time, or even if she did leave Italy, she might not have been in the United States when the petitioner was born. In short, "proper conduct" of the consul would not have assured that petitioner would be born in the United States. Thus, those authorities which preclude the government from relying upon improper conduct of government officials which *directly leads* to a certain course of conduct by an individual, causing his loss of citizenship rights (see *Lee You Fee* v. *Dulles, supra; Podea* v. *Acheson, supra; Dos Reis ex rel. Camara* v. *Nicolls, supra*), are inapposite, for here

the alleged misconduct cannot be said to have led directly to petitioner's birth in Italy.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment below should be affirmed.

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